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85-1428

No. .....

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1985

NATIVE VILLAGE OF STEVENS,

Petitioner,

vs.

ROBERT SMITH, in his official capacity as the Commissioner of Health and Social Services, WILLIAM SHEFFIELD, in his official capacity as Governor of the State of Alaska, and the STATE OF ALASKA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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SUMMARY OF ARGUMENT

The Ninth Circuit's decision in this case does not meet any of the criteria justifying a grant of certiorari by this court.

The Ninth Circuit's decision does not conflict with that of this Court in *Miller v. Youakim*. The two cases deal with different portions of the Social Security Act: *Miller* with the inclusion of relatives in the definition of "foster family;" *Native Village of Stevens* with whether "coordinate" means "delegate." Just as Congress clearly intended relatives to be included in the definition of "foster family," it did not intend to *require* states to delegate Title IV-E foster care responsibilities, although it acknowledged delegation as an acceptable option.

Neither does the Ninth Circuit's decision conflict with that of the First Circuit in *Lynch v. Dukakis*. Both courts found the requirements of 42 USC 671(a) to be mandatory on qualifying states. But in the instant case the Ninth Circuit found Alaska was in compliance, while in *Lynch* the court found Massachusetts was not.

Certiorari should be denied.

———o———

ARGUMENT

The Native Village of Stevens (Stevens) is trying to use the Court through this case to coerce the State of Alaska into paying for Stevens' foster care placements. Ironically, if the state were to make such payments it would be in violation of Title IV-E of the Social Security

Act because the State has never entered into an agreement with Stevens to make such payments.

The case began when Stevens took custody of a child named T.O. and placed him in foster care. Lacking adequate funding to pay for the foster care, Stevens asked the State of Alaska, Department of Health and Social Services (DHSS), to pay for T.O.'s foster care. DHSS declined, stating it does not pay foster care for other states or other entities.

Stevens took the matter to the U.S. District Court for the District of Alaska, asserting that both the Social Security Act (Title IV-E) and the Indian Child Welfare Act (ICWA) required the State to pay for foster care arranged by the village. The district court rejected these arguments and granted summary judgment to the State. The Ninth Circuit affirmed this decision, holding that neither ICWA, in 25 USC 1919(a), nor Title IV-E, in 42 USC 671(a)(4), "requires the State involuntarily to enter into an agreement concerning foster care services with Stevens." *Native Village of Stevens v. Smith,* 770 F.2d 1486, 1489 (9th Cir. 1985). The court of appeals also found that Stevens had produced no evidence that the State was out of compliance with 42 USC 671(a)(4). *Id.* Finding no statutory base for Stevens' position, the Ninth Circuit properly affirmed the lower court.

In its petition for certiorari Stevens now argues the Ninth Circuit's decision conflicts with *Miller v. Youakim,* 440 U.S. 125, 99 S.Ct. 957 (1979) and *Lynch v. Dukakis,* 719 F.2d 504 (1st Cir. 1983).

I. The Decision of the Ninth Circuit is Consistent with Miller v. Youakim.

In *Miller v. Youakim,* 440 U.S. 125, 99 S.Ct. 957 (1979), the Court dealt with interpretation of the statutory forerunner of Title IV-E of the Social Security Act which the Ninth Circuit intepreted in the instant case. The question in *Miller* was whether placement with a relative was within the definition of "foster family" as used in 42 USC 608(a). Interpreting the statute as it was written, this Court concluded that it was. The question before the Ninth Circuit, and in this appeal, is whether when Congress required the states to "coordinate" Title IV-E programs with other programs it really meant to require the states to "delegate" their Title IV-E responsibilities. Again, interpreting the statute as it was written, the Ninth Circuit concluded it did not.

Stevens has consistently argued to the lower courts that 42 USC 672(a)(2) of Title IV-E of the Social Security Act must be incorporated into 42 USC 671(a)(4). The lower courts, recognizing the different focus of the two statutes, have just as consistently disagreed. Section 671 sets the requirements for state plans to qualify for federal foster care assistance. In contrast, Section 672 defines which children will receive federally subsidized foster care payments once a state has qualified for the program.

A. Alaska has met the requirement of Section 671(a)(4).

Section 671(a)(4) requires a qualifying state plan to

> . . . assure that the programs at the local level assisted under this part *will be coordinated with* the programs at the State or local level assisted under

> parts A and B of this subchapter, under subchapter XX of this chapter, and under any other appropriate provision of Federal law. (emphasis added)

In Alaska, as the Ninth Circuit found, this requirement is met by arranging complementary programs with the available federal funds, programs which do not compete with or duplicate one another's services. *Native Village of Stevens v. Smith,* 770 F.2d 1486, 1489 (9th Cir. 1985). Stevens could provide no evidence of lack of coordination of programs, only assertions of insufficient funding for its own programs. *Id.*

B. Alaska meets the requirements of Section 672(a)(2) directly, not through delegation.

Lacking evidence of Alaska's failure to coordinate its Title IV-E programs, Stevens has attempted to engraft into the Section 671(a)(4) mandatory plan requirements some language from Seciton 672(a)(2) which sets out one of four criteria which must be met before a particular child can be eligible for the Title IV-E foster care payments:

> (2) such child's placement and care are the responsibility of (A) the State agency administering the State plan approved under section 671 of this title, or (B) any other public agency with whom the State agency administering or supervising the administration of the State plan approved under section 671 of this title has made an agreement which is still in effect; . . .

This criterion, like the other three, is *mandatory* for Title IV-E foster care payments. But the qualifying state may meet this criterion in one of two ways: by exercising responsibility for the child's care directly itself *or* by delegating it under a current, written agreement to another public agency. Section 672(a)(2) clearly offers the

state the choice. Nothing in Section 671 takes away that choice.

No other Congressional action has preempted state choice either. Congress has had several opportunities to require delegation to Indian tribes of responsibility for providing foster care services for Indian children. It did not do so in ICWA adopted in 1978, even though some ICWA provisions qualify tribal actions to meet other Title IV-E, Section 672 requirements. For example, in ICWA Congress specifically requires that the United States give tribal court judicial proceedings regarding child custody equal weight with those of state courts. 25 USC 1911 (d). In the context of Title IV-E, then, tribal court determinations regarding the need for foster care meet the Section 672(a) (1) requirement of a placement after judicial determination. *Native Village of Stevens*, 770 F.2d at 1488.* Similarly in ICWA Congress specifically provided that "licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a state." 25 USC 1931(b). So again, in the context of Title IV-E, tribal licensing or approval of a foster home meets the Section 672(a)(3) and (c)(1) requirement of a licensed foster home in which to place the child. 770 F.2d at 1488. But Congress did not go further. It recognized tribes' powers to take these independent actions, but it did not require states to delegate their foster care services responsibilities to tribes.

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* *See also* United States Department of Health, Education and Welfare, Social and Rehabilitation Service, State Letter No 1062, ¶ 3, March 3, 1969. (Appendix)

Similarly, the Adoption Assistance and Child Welfare Act of 1980, and its subsequent revisions have provided other opportunities for Congress to give tribes direct responsibility for foster care services, but Congress has so far not seen fit to do so. This Congressional omission cannot be mere oversight. Congress has shown no hesitancy in specifying which Social Security Act programs it believes Indian tribes should have direct access to. *See* 42 USC 628. But even when it authorized payment of Title IV-B funds directly to tribes, Congress did not *require* such direct payments. Rather, it left the decision as to "appropriate cases" for such payments entirely in the discretion of the Secretary of Health and Human Services. *Compare* 42 USC 628 *with* 25 USC 1931 and 1932. Congress has given the states a similar choice in Section 672(a)—between retaining direct state control over delivery of foster care services and delegating the implementation to other public agencies. Congress has appropriately left the choice between these alternatives entirely in the discertion of participating states.

The State of Alaska has chosen to exercise its responsibility for meeting Title IV-E standards through a single state agency, the Department of Health and Social Services, rather than through delegation. This decision is consistent with the *Miller* court's recognition that "the state must remain responsible for the placement and care of the child." 440 U.S. at 134, 99 S.Ct. at 964. Beyond this point, *Miller* has no bearing on this case.

In Title IV-E, then, there is no basis for concluding that the "coordinate" requirement in Section 671(a)(4) is in any way controlled by the "delegation" option in Section 672(a)(4). Congress' intent was to ensure that

a child whose foster care is federally subsidized receives certain services; it left to the states determination of how best to ensure delivery of those services.

The Ninth Circuit decision below does not come in conflict with *Miller v. Youakim* simply by recognizing Congress' authority to assign the power to make these choices.

II. The Ninth Circuit's Decision in This Case Does Not Conflict With the First Circuit's Decision in Lynch v. Dukakis.

Stevens also asserts a conflict between the First Circuit's decision in *Lynch v. Dukakis*, 719 F.2d 504 (1st Cir. 1983) and the Ninth Circuit's decision that 42 USC 671(a)(4) does not require the state to enter into a foster care agreement with Stevens Village. Stevens arrives at this conclusion by characterizing the Ninth Circuit's statements as making Section 671(a) provisions "permissive." At no point did the Ninth Circuit so hold.

In *Lynch*, the First Circuit found that Massachusetts was not providing case plans and periodic reviews of those plans for each child in foster care as required by 42 USC 671(a)(16). In contrast, the Ninth Circuit found in *Native Village of Stevens*, where the "coordination" provision was at issue, that Alaska was meeting the coordination requirement of 42 USC 671(a)(4) by measures other than the formal written agreement Stevens wants to force upon Alaska:

> Nothing in section 671(a)(4) requires the State involuntarily to enter into an agreement concerning foster care services with Stevens. Moreover, Stevens' sole evidence of a lack of coordination is the absence

> of an agreement between it and the State. There is no indication of competition or interference between the tribe and the State. The State declined to pay for T.O.'s foster care because he was in the tribe's custody; it did offer to accept referral of T.O. and his family and to assess their eligibility for services offered by the State.

Native Village of Stevens, 770 F.2d at 1489.

Having found Alaska in compliance with Section 671, the Ninth Circuit turned to the crux of this case, compliance with Section 672 which provides in relevant part:

> (2) such child's placement and care are the responsibility of (A) the State agency administering the State plan approved under section 671 of this title, or (B) any other public agency with whom the State agency administering or supervising the administration of the State plan approved under section 671 of this title has made an agreement which is still in effect; . . .

Stevens had conceded that it has, and had, no such agreement with Alaska. 770 F.2d at 1489. But Stevens would have this Court ignore the plain language of this statute and find that states are *required* to enter into, and presumably to keep current always, Section 672(a)(2)(B) agreements with any Indian tribe within its borders in order to "coordinate" its Title IV-E programs with other federally funded programs.

To so find, of course, this Court would have to eliminate from Section 672(a)(2) the language in Subsection A and the "or" before Subsection B by which Congress clearly granted the states a choice of how to implement delivery of their foster care services. The Court would also have to accept Stevens' implicit argument that Congress meant "delegate" when it said "coordinate," rather than anticipating that the 50 states would each find

different ways of ensuring Social Security Act funds are not used for conflicting or competing programs.

The Ninth Circuit preferred to interpret these statutes as they were written. Since Congress does not use language mandating particular agreements between states and tribes, in either Section 671(a)(4) or Section 672(a)(2), the court declined to impose such agreements on Alaska. 770 F.2d at 1489. This Court should permit the Ninth Circuit's decision to stand by denying certiorari.

———o———

CONCLUSION

The Ninth Circuit's decision is consistent both with this Court's decision in *Miller v. Youakim* and with the First Circuit's decision in *Lynch v. Dukakis*. It is also a straight forward reading of an unambiguous portion of the Social Security Act which does not need the further clarification of this Court's scrutiny. The petition for certiorari should therefore be denied.

DATED: April 8, 1986

Respectfully submitted,

HAROLD M. BROWN
Attorney General

By: /s/ D. REBECCA SNOW
Assistant Attorney General

APPENDIX

(SEAL)

ATTACHMENT

March 17, 1969

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D.C. 200201

SRS-APA-PS
March 3, 1969

State Letter No. 1062

TO STATE AGENCIES ADMINISTERING
APPROVED PUBLIC ASSISTANCE PLANS

Subject: Eligibility of Indians, Including Those Living on Reservations for Assistance and Services Under Provisions of the Social Security Act

Questions have been raised which indicate States may not be clear as to the eligibility of Indians for financial assistance and services provided under the Social Security Act.

The following interpretations are aimed at resolving any uncertainty in this regard:

1. State plan provision putting into effect Titles I, IV, I, IV, XVI, and XIX must be available State-wide to all eligible individuals. This includes State plan provisions added as a result of the 1967 legislation with reference to AFDC Emergency assistance, unemployed fathers, and foster care.

2. Financial assistance through the Bureau of Indian Affairs, U.S. Department of the Interior (as well as medical assistance through Indian Health Services, Public Health Service, U.S. Department of Health, Education, and Welfare, (see State Letter No. 1031)), is not available to individuals eligible for assistance from any other source.

Assistance, therefore from the Bureau of Indian Affairs, Department of the Interior, cannot be considered a basic resource in determining an individual's eligibility for a federally assisted program under the Social Security Act, since that resource is not actually available to persons eligible for the public assistance programs.

3. The Social Security Act provides that Federal sharing is available under certain conditions when a child has been removed from his home as the result of a judicial determination. The court or other judicial authority must have jurisdiction in such matters. Indian tribal courts and courts of Indian offenses are courts of competent jurisdiction in this respect, and are so recognized by the laws and regulations of the United States.